89-555

Supreme Court, U.S.
FILED
SEP 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

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IN THE
SUPREME COURT OF
THE UNITED STATES
October Term, 1989

*

BENTON MUSSLEWHITE,
Petitioner

VS.

THE STATE BAR OF TEXAS,
Respondent

*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

*

PETITION FOR WRIT OF CERTIORARI

* * *

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Sec. 24 of Art 10 of the Texas State Bar Rules, *reprinted in Appendix to Tex. Gov't Code, Title 2, Subtitle G* (Vernon 1988), as written and/or as applied in this case, violates the Fifth, Fourteenth and/or possibly the Eighth Amendments to the Constitution of the United States, because it provides for a ***blanket*** ban on supersedeas pending appeal by an attorney from a judgment of suspension by a trial court, even though the purported grounds for suspension do not pertain to a crime or accusation involving moral turpitude but involve only hypertechnical constructions of the State Bar's advertising rule; the suspended attorney has not been shown to constitute a threat of harm to his clients, potential clients or the public; and, though challenged to do so in the trial court, the State Bar wholly failed to offer any evidence or make

any effort to establish a legitimate state or police power reason for imposing such a blanket ban on supersedeas.

II.

Whether the failure of Section 24 to provide for, and the failure of the trial court to conduct, an evidentiary hearing on the question of the propriety of supersedeas violates Petitioner's rights under the Equal Protection and Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Questions Presented for Review... i

Citation of Authorities..... v
Index of Appendices xii
Reference to Official Orders, Judgments and Opinions Delivered by the Court Below..... 1

Grounds Upon Which Jurisdiction Is Invoked..... 3

Constitutional Provisions, Statutes, And Rules Which This Case Involves..... 3

Statement of Case..... 4

Reasons for Granting Writ of Certiorari:

A. Sect. 24, Art. 10 of the Texas State Bar Rules Is Unconstitutional As Written and/or As Applied In This Case..... 35

B. The Harmful Consequences of Suspending Petitioner Pending Appeal Are Exacerbated By The Fact that Petitioner Is Going To Win The Appeal On The Merits (Or At the Very Least There Is "Fair Grounds For Litigation")..... 53

1. Giving Only Five Days Notice of the Revocation Petition and Trial on the Petition Constitutes Gross Abuse of Due Process Rights..... 52

2. Failure to Process Piper Alpha Allegations Through the Grievance Committee and Allow Trial by Jury Thereon Before Utilizing Revocation Procedures Violates Due Process of Petitioner..... 56

3. By Prosecuting the Petitioner for Communications Directed Only To U.K. Solicitors and Lawyers, Respondent and Judge Casseb Clearly Violated Petitioner's First Amendment Rights..... 60

4. The Prosecution of Petitioner on the Basis of the Hartman Agent Orange Case Violates Petitioner's Constitutional Rights Under the Vagueness Doctrine..... 59

5. There Can Be No Doubt That the Discriminatory Prosecution of Petitioner In this Case Violated the Petitioner's Constitutional Rights Under the Equal Protection Clause..... 61

Prayer..... 64

Table of Citations

Cases:

Aetna Ins. Co. v. Kennedy
301 U.S. 389 (1936)..... 57

Armstrong v. Nanzo
280 U.S. 545 (1965)..... 54

Atkins v. Parker
472 U.S. 115 (1985)..... 54

Attorney Grievance Commn v. Reamer
379 A.2d 171 (Md.App. 1977)..... 50

Bates v. State Bar of Arizona
438 U.S. 350 (1977)..... 51, 57

Central Anderson Gas. v. Public Service Commn
447 U.S. 557 (1980)..... 51

Chick Kam Choo v. Exxon,
817 F.2d 307 (5 Cir. 1987), rev'd 100 L.Ed.2d 127 (1988).. 15

Ciechon v. City of Chicago,
686 F.2d 511 (7 Cir. 1982)... 24, 62 63

Cleburne v. Cleburne Living Center
473 U.S. 432 (1985)..... 62

Daves v. State Bar of Texas
691 S.W.2d 784 (Tex.App. 1985)..... 36

Edwards,State Bar of Texas v.
646 S.W.2d 543 (Tex.App.
1982)..... 61

Evitts v. Lucey
105 S.Ct. 830 (1985)..... 56

Friedland, United States v.
502 F.Supp. 611 (DCNY
1980)..... 43, 44, 45
46

Frierson v. Realty Corp.
54 N.Y.S.2d 243 (City
Ct, N.Y. 1945)..... 56

Fuentes v. Shevin
407 U.S. 67 (1972)..... 50, 56

Gault, In re
387 U.S. 1 (1967)..... 54

Goldberg v. Kelly
387 U.S. 254 (1970)..... 54

Griffin v. Illinois
351 U.S. 1 (1956)..... 56

Groeger v. Mifles Realty Corp.
182 N.Y.S.2d 731 (N.Y.Sup.
1959)..... 57

Heard v. State Bar of Texas
603 S.W.2d 829 (Tex. 1980)... 41

Larew v. Sale, State ex rel.
87 S.W. 967 (Miss. 1905)..... 43

Lindsey v. Normal
405 U.S. 56 (1972)..... 49

Linmark Associates, Inc. v.
Township of Willingboro
431 U.S. 85 (1977)..... 51

Logan v. Zimmerman Brush Co.
455 U.S. 422 (1982)..... 55, 56

Louisiana Bar Assn v. Ehmig
277 So.2d 137 (La. 1973)..... 43

Matter of R.M.J.
455 U.S. 919 (1982)..... 51, 57, 58

Metromedia, Inc. v. San Diego
453 U.S. 490 (1981)..... 51

Ming, In re
469 F.2d 1352 (7 Cir. 1972).. 43, 44

Mullane v. Central Hanover
Bank
339 U.S. 306 (1949)..... 54

Mulvaney v. New Jersey
407 U.S. 925 (1972)..... 45

Nebraska Press Assn. v. Stuart
423 U.S. 1327 (1975)..... 41

Olshock v. Village of Skokie
541 F.2d 1254 (7 Cir. 1976).. 62

Orr v. Orr,
440 U.S. 268 (1979)..... 3

Pennzoil v. Texaco,
95 L.Ed.2d 1 (1988)..... 12, 28, 39,
42

People v. Treadmill
5 P. 686 (Calif. 1885)..... 43

Ricardi, In re
189 P. 694 (Calif. 1920)..... 43

Roller v. Holly
176 U.S. 398 (1900)..... 53

Ruffalo, In re
390 U.S. 544 (1986)..... 46

Schware v. Board of Bar Examiners
353 U.S. 232 (1957)..... 43

Sizemore v. State Board of Dental Examiners
747 S.W.2d 389 (Tex.App. 1987), rev'd on other grounds, 759 S.W.2d 114 (Tex. 1988).... 47, 48

Solemn v. Helm
77 L.Ed.2d 637 (1983)..... 48

Spencer v. The Honorable Justices of the Supreme Court of Pennsylvania
579 F.Supp. 880 (E.D.Pa. 1984)..... 57, 58

Texas v. Johnson
57 U.S.L.W. 4770 (1989)..... 31

Virginia Pharmacy Bd. v. Virginia Consumers Council
425 U.S. 748 (1976)..... 51

White v. White
196 S.W.2d 508 (Tex. 1917)... 56

Willner v. Committee on Character and Fitness
373 U.S. 96 (1963)..... 43

Yick Wo v. Hopkins
118 U.S. 356 (1885)..... 61

Yormark, State v.
284 A.2d 549 (N.J.Super.
1971)..... 45

Younger v. Harris
401 U.S. 37 (1971)..... 41

Zauderer v. Office of Disciplinary
Counsel
471 U.S. 616 (1985)..... 47, 50, 54
58, 59

Zeesell Realty Co. v.
Cunningham
211 N.Y.S. 591 (N.Y.Sup.
1925)..... 56

United States Constitution:

Amendment 1..... 4, 19, 21
passim

Amendment 5..... 3, 39, 50
passim

Amendment 8..... 3, 39, 47
passim

Amendment 14..... 3, 39, 47
passim

United States Code

23 U.S.C. 1257..... 2

28 U.S.C. 2101(f)..... 27

46 U.S.C. 688(B)..... 7

United States Supreme Court Rules:

24.4(e)..... 3

Texas Rules of Civil Procedure:

Rule 99..... 15

Rule 245..... 15, 54

Texas Civil Practices and Remedies Code:

Section 71.031..... 16

Texas Government Code:

Section 81.077(a)..... 15, 55

Texas Code of Criminal Procedure:

Article 42.04..... 49

Texas Rules of Appellate Procedure:

Rule 49(b)..... 2, 24, 25 passim

Rule 121..... 26

Rule 130..... 26

Texas State Bar Rules:

Article 10, Sec. 5(f)(5)..... 9

Article 10, Sec. 16(I)..... 55, 57

Article 10, Sec. 10-23..... 15, 24, 55 passim

Article 10, Sec. 22..... 4, 24, 28 passim

Article 10, Sec. 24..... 4, 24, 26 passim

Article 10, Sec. 26..... 4, 29, 42

(Disciplinary Rules):

DR 2-101..... 4, 59

DR 2-102..... 4, 59, 60

DR 2-107..... 2, 60, 61

APPENDICES TO PETITION
FOR WRIT OF CERTIORARI

Appendix

A. Judgment of Suspension Entered by State District Court.

B. Order of State District Court Denying Rule 47 Motion, Requesting Supersedeas.

C. Order and Opinion of State Court of Appeals Denying Mandamus, Concerning Supersedeas.

D. Order of Supreme Court of Texas Denying Mandamus, Concerning Supersedeas.

E. Order Denying One - Justice Stay by Justice Byron White, Concerning Supersedeas.

F. Order of State Court of Appeals, Denying Rule 49(b) Motion, Concerning Supersedeas.

G. Order of Supreme Court of Texas, Dated June 14, 1989, Denying Mandamus With Respect To Court of Appeals' Denial of Rule 49(b) Motion, Concerning Supersedeas.

H. Relevant Provisions of Texas State Bar Rules, Including Sec. 24, art. 10.

I. Excerpts from news articles.
   1. Announcement of Probe of Two "Agent Orange Lawyers" (Musslewhite and O'Quinn).

2. National Article Concerning Dispute Between Musslewhite and O'Quinn and U.S. Army Over Arrow Air Cases.
3. Bar Officials Launch Trial-In-Press; Announce 17 Houston Lawyers Being Investigated.
4. Detailed Article Concerning "Masters of Disaster" Investigation.
5. O'Quinn Complains of Selective Prosecution; Discusses Appointment of Special Prosecutor.
6. ABA Jl. Article Re "17 Lawyer" Investigation, Discussing Mostly Musslewhite and O'Quinn.
7. Further Discussion in Press Of Special Prosecutor and Filing Of Disbarment Suits Against Musslewhite, O'Quinn and Schwartz.
8. Further Discussion In Press Of Disbarment Suits Against O'Quinn and Musslewhite.
9. Houston Chronicle "Guilt By Association" Article Re O'Quinn, Improperly Implicating Musslewhite.
10. Another "Guilt by Association" Houston Chronicle Article About O'Quinn, Again Impliedly Tying Musslewhite to Subject Matter.
11. Musslewhite Vainly Tries To Clarify That He Is Not Part Of O'Quinn-McNeilly-Keen Situations.
12. Article Announcing 2nd Disbarment Suit Against Musslewhite.
13. Article Stating Jury Tampering Charges Against O'Quinn Untrue, But Still Mentioning Musslewhite.

14. Special Prosecution Accused By Certain Bar Officials Of Being "Runaway Prosecutor", Using "Vigilante" Tactics, And Conducting "Trial-In-The-Press".
15. Another, More Detailed Article About Special Prosecutor Being "Runaway Prosecutor", Using "Vigilante" Tactics And "Trial-In-The-Press".
16. Another Guilt-By-Association Article Whereby Alleged Witnesses Directly Accuse O'Quinn, But Musslewhite Improperly Implicated.
17. Special Prosecutor Terminated Because Of Controversial, Trial-In-The-Press, Vigilante Tactics.
18. Press Conference By Musslewhite Concerning Settlement With State Bar.
19. Press Conference By Musslewhite Concerning Filing Of Hartman-Agent Orange Suit.
20. Press Conference By Musslewhite And Newman Concerning The Piper Alpha Episode.
21. State Bar Starts In On Musslewhite Again With Its Trial-In-The-Press Tactics.
22. Further Trial-In-The-Press Of Musslewhite Concerning Piper Alpha.
23. Article In Scottish Press About Musslewhite's Fight With Texas State Bar.
24. Article In Scottish Press Quoting Other American Lawyers About Same Matters DiscussedBy Musslewhite.

25. State Bar Officials Improperly Discuss In The Press TheirEfforts To Revoke Musslewhite's Probation.

26. Discussion of the Efforts To Revoke Musslewhite's Probation in The National Press.

27. Report of Evidence At Revocation Trial.

28. Article About Smoot Of State Bar Testifying Musslewhite Did Not Contact Any Victims Or Their Families.

29. Article About O'Quinn's "Wrist-Slap" Settlement With State Bar.

30. Article Re Settlement With O'Quinn Wherein Peterson Of State Bar Admits He Had No Case Based Upon Solicitation.

31. Article Discussing "Wrist Slap" Settlement With Schwartz And How, Of All The Lawyers "Investigated", The "Harshest Penalty" Was Imposed On Musslewhite.

32. Article About Musslewhite's Work On The Agent Orange Case.

J. Disbarment Petition Against Benton Musslewhite, Concerning Solicitation.

K. Disbarment Petition Against John O'Quinn, Concerning Solicitation.

L. Excerpts From Brochure Given By State Bar To Potential Claimants Showing Failure To Answer Telephone Calls Not Normally A Ground For Discipline.

M. Excerpts From Offer Of Reprimand To Musslewhite From Committee 4-A And Rejection By Musslewhite.

N. Excerpts From Musslewhite's Request For Change Of Venue From Committee 4-C, Because Of Leaks To Press.

O. O'Quinn's Request For Change Of Venue From Committee 4-C, Because Of Leaks To Press And Hostility, With Affidavits.

P. Musslewhite's Motion For Change Of Venue In The Trial Court Because Of Prejudicial Pre-trial Publicity And Motion To Interrogate Members Of Jury Panel Separately.

Q. The "Agreed Judgment" With State Bar, Agreed To By Musslewhite To Try To End A Decade Of Harrassment.

R. Benton Musslewhite Affidavit Filed In State Court Of Appeals About All Events, But Particularly About Selective Prosecution And Harm Resulting From Denial Of Supersedeas.

S. The Referral Letters And Power Of Attorney Demonstrating That Hartman-Agent Orange Case Was Properly Referred As Required By The "Referral Clause".

T. Petition To Revoke Probation, With Exhibits, And Documents Pertaining To Service Of Same, Demonstrating Musslewhite Only Had Six Days Notice Of The Petition And Revocation Trial.

U. Motion For Continuance Filed At Revocation Trial, Asserting Violation Of Musslewhite's Procedural And Substantive Due Process Rights, Because Of Inadequate Notice Of Trial.

V. Plea and Abatement Filed At Revocation Trial, Requesting Abatement Until State Bar Complied With Sections 10-23, Art. 10, State Bar Rules Calling For Processing Through Grievance Committee And Trial By Jury.

W. Rule 47 Motion Filed In Trial Court, Requesting Supersedeas Of Suspension Judgment.

X. Papers Reflecting Requests By Musslewhite Of State Court Of Appeals To Expedite Appeal And Rejection By Court Of Appeals.

Y. Rule 49(b) Motion Filed In State Court Of Appeals By Musslewhite, Requesting Such Court To Require Supersedeas.

Z. Excerpts From Musslewhite's Third Petition For Mandamus, Concerning Supersedeas, Filed In State Supreme Court.

AA-1. Excerpts From Trial Court Record Establishing How Trial Court Implicitly Found That Musslewhite Not A Threat To Clients Or Public Because Court Granted Deferral Of Suspension.

AA-2. Excerpts From Musslewhite's Motion To Defer Suspension, Which Was Partially Granted.

AA-3.Excerpts From Brief Of State Bar In State Court Of Appeals, Demonstrating That State Bar Does Not Contend That Musslewhite Poses Threat Of Harm To Clients Or Public.

BB-1.Gloria Chaplin's Affidavit, Establishing Harm To Clients Resulting From Improvident Suspension Of Musslewhite.

BB.2.Ms. Chaplin's Trial Court Testimony To Same Effect.

CC.Excerpts From Trial Court Uncontradicted Testimony Of Musslewhite and Newman Demonstrating That Musslewhite Objected To Running Of Ad And Sending Of Letter Re Piper Alpha Matter.

DD.Articles Concerning Selective Prosecution, Including Comments About The State Supreme Court's Observations Re Selective Prosecution.

EE.Excerpts From Briefs Filed By Musslewhite In State Court Of Appeals, Discussing Points Of Error, etc.

REFERENCE TO OFFICIAL ORDERS, JUDGMENTS AND OPINIONS DELIVERED BY THE COURT BELOW

1. The judgment of suspension of the state trial court, dated Nov. 21, 1988, suspending Petitioner for three years, effective Jan. 31, 1989. (Appendix A).

2. The order of the state trial court, dated Jan. 12, 1989, denying Petitioner's Rule 47 (of the Texas Rules of Appellate Procedure) Motion, requesting supersedeas of the judgment of suspension. (Appendix B).

3. The order and opinion of the state court of appeals, dated Jan. 19, 1989, denying Petitioner's petition for a writ of mandamus, mandamusing the trial court to grant supersedeas of the judgment of suspension. (Appendix C).

4. Order of the supreme court of Texas, dated Jan. 25, 1989, denying petition for writ of mandamus, requesting that the trial court be mandamused to grant supersedeas of the judgment of suspension. (Appendix D).

5. Order of Justice Byron R. White, dated Feb. 16, 1989, denying first Application for One Justice Stay of the

judgment of suspension and/or for mandatory relief, requiring the trial court to grant supersedeas of the judgment of suspension. (Appendix E).

6. Order of the state court of appeals, dated Feb. 16, 1989, denying the Petitioner's Rule 49(b) (of the Texas Rules of Appellate Procedure) Motion, requesting the court of appeals to immediately reverse the trial court's denial of supersedeas and grant Petitioner supersedeas of the judgment of suspension. (Appendix F).

7. Order of the supreme court of Texas, dated June 14, 1989, denying the Petitioner's third petition for writ of mandamus, requesting the supreme court, following the court of appeals' denial of the Rule 49(b) Motion, to mandamus the trial court or the court of appeals to grant Petitioner supersedeas of the judgment of suspension. (Appendix G).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The final judgment of the state's highest court, the supreme court of Texas, denying relief with respect to Petitioner's request for supersedeas pending appeal of the judgment of suspension, was entered on June 14, 1989. This Petition for Writ of Certiorari is being timely transmitted within ninety days of the final judgment of the state's highest court with respect to the supersedeas question. The jurisdiction of this Court is invoked under 23 U.S.C. 1257, as amended June 27, 1988. See *Orr v. Orr*, 440 U.S. 268 (1979). Pursuant to Rule 24.4(e) of the Rules of this Court, the attorney General of Texas was served with three copies of this Petiton for Writ of Certiorari (as well as to the General Counsel of the State Bar of Texas).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES WHICH THIS CASE INVOLVES

This case directly involves the Fifth, Fourteenth and possibly the Eighth Amendments to the Constitution of the United States and

indirectly the First Amendment of the U.S. Constitution. It also directly involves Sec. 24 of Art. 10 of the Texas State Bar Rules, supra, and indirectly involves Sections 22 and 26 of Art. 10 of those Rules and DR 2-101 and DR 2-107 of the Texas Disciplinary Rules. (All of such provisions of the State Bar Rules and Disciplinary Rules are contained in Appendix H).

STATEMENT OF THE CASE

The State Bar of Texas, Respondent herein, harassed the Petitioner for several years leading up to 1986, but without success. Their essential complaint about Petitioner was that he allegedly engaged in solicitation, primarily of victims of mass disasters and potential clients in toxic tort litigation. The Petitioner denied these charges throughout. As events finally clarified things, it became obvious that the real basis for the decade long vendetta against Petitioner was that certain power structures within the State Bar did not like the way Petitioner exercised his First Amendment rights. What rankled them most was that

Petitioner routinely conducted television press conferences in connection with mass disasters and other controversial litigation. See discussion, infra. Because of these high profile activities, the Petitioner was unpopular not only with the insurance industry-chemical company, business interests and their law firms but also with a powerful clique within the plaintiffs' bar, overly concerned with their own image rather than protecting victims and getting them justice.

In late 1985, as the "tort reform" drive with regard to the 1987 session of the Texas legislature opened up, the State Bar announced it was "investigating" several Houston lawyers for alleged illegal "solicitation" practices but, in fact, it only identified three of the targets, who, not coincidentally, were the same three who were the *only* three Texas lawyers on the national Agent Orange Plaintiffs Management Committee ("AOPMC"), namely Petitioner, John O'Quinn and Newton Schwartz.[1] See App. I-1 thru 4, 7, 8.

1. The nine member AOPMC was charged with the responsibility of conducting the national class action involving Agent Orange claimants

(The "App." references are to the Appendices filed in connection with this Petition, under separate cover.)

The "investigation" of these three lawyers took on a dark force, unparalleled in Texas Bar history. The matter was referred to a very aggressive grievance committee, Committee 4-C (not the one under local rules that should have handled the investigation of these three attorneys); that committee prevailed upon the State Bar Board of Directors to take the unprecedented step of hiring a special prosecutor, Tom Alexander, to prosecute *only* Petitioner, O'Quinn and Schwartz; Alexander, as had members of Committee 4-C and other State Bar officials before him, began to publicly denigrate these three lawyers and to conduct the "investigation" and trial in the press;[2] and Alexander,

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in Brooklyn, New York, *In Re Agent Orange*, MDL 381, E.D.N.Y.

2. Alexander referred in the press to Petitioner, O'Quinn and Schwartz as the "masters of disaster"; as having a "network" of "runners"; and engaged in constant "leaks" to the press calculated to seriously prejudice the rights of the three. See App. I-9 thru I-17.

without providing them with a hearing as required by Sec. 10(E) of Art. 10 of the State Bar Rules, sought disbarment of Petitioner and O'Quinn, alleging illegal solicitation and fee-splitting.[3]

Petitioner did not know at that time that he had been selected as the "scapegoat" and sacrificial lamb on the alter of this grand inquisition and O'Quinn and Schwartz, as well as all others, had been made "sacred cows" by the General Counsel, Mr. Steve Peterson.[4]

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3. See App. J, the petition in Petitoner's case, and App. K, the petition in O'Quinn's case. The State Bar also sued Schwartz but on the basis of mishandling client funds.

4. One explanation for this is that probably no other attorney in Texas has been involved in as much controversial litigation. E.g., the Agent Orange, PCB, Liberty Waste Dumpsite, Bhopal, Ocean Ranger, Ranger I and Arrow Air litigation. Also, in 1982, Congress passed an amendment to the Jones Act, 46 U.S.C. 688(B), one of the most chauvinistically unconstitutional bills ever passed, which excluded foreign seamen working on American offshore drilling vessels from Jones Act coverage. This bill was derisively referred to by the insurance company interests as the "Musslewhite amendment". Petitioner was involved in the Agent Orange litigation throughout and was to be one of the five attorneys to conduct the trial; O'Quinn and Schwartz were brought into the litigation by Petitioner at a much later date and then principally only to help finance the litigation. See App. I-32. Petitioner was the only one of the nine AOPMC members who turned

This all began to come to light through a combination of events. First, the Respondent filed another disbarment suit against Petitioner (but not against O'Quinn and Schwartz), basing it upon patently frivolous client complaints centered around Petitioner's alleged failure to return telephone calls. Respondent undertook this harrassment when it had all along stated, in its brochure to potential complainants, that the failure to answer telephone calls was not generally an appropriate ground for prosecution. See App. L. This disbarment suit was instituted by the infamous Committee 4-C, without giving

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against the settlement with the chemical companies and he became very controversial for doing so. Petitioner filed suit in Texas in the controversial Bhopal litigation; O'Quinn and Schwartz were not involved in that case. Petitioner initiated the high-profile Liberty Waste Dumpsite litigation. Schwartz was not involved and O'Quinn was only later brought into it by Petitioner, again principally for the purpose of financing the litigation. Petitioner was on the Plaintiffs' Committee in the Ocean Ranger litigation and Schwartz was not involved and O'Quinn only at the very end, at the request of Petitioner. But, as to the disbarment allegations, Petitioner and O'Quinn were similarly situated; indeed, the allegations against O'Quinn were much more serious. Compare Apps. J and K and see App. see I-8 thru I-11, 12, 13 and 16.

Petitioner the hearing required by Sec. 10(E), Art. 10 with regard to two of the complaints and despite the fact that the committee that was supposed to handle the complaints, Committee 4-A, had recommended only a reprimand in connection with such types of complaint. See App. M.[5]

Unbeknown to Petitioner until later, Steve Peterson, the State Bar General Counsel, negotiated a sweatheart deal with O'Quinn's attorney, David Berg, who himself had been the chairman of one of the grievance committees. The deal provided that O'Quinn would receive only a reprimand. See App. I-17 and I-5. But this secret deal was stopped by

5. O'Quinn sought, pursuant to Art. 10, Sec. 5(f)(5) of the State Bar Rules, a transfer from Committee 4-C (because of their leaks to the press and violations of the State Bar Rules concerning confidentiality) and it was eventually granted by the Disciplinary Review Committee ("DRC"), but Petitioner's request, made on the same grounds as O'Quinn's, was not acted upon by the DRC and was never granted. See App. N. Indeed, Franklin Jones, Jr., Chairman of the DRC, testified that Committee 4-C proceeded to file suit against Petitioner before the DRC could act, even though the General Counsel, Steve Peterson, had promised Mr. Jones that they would not do so until after the DRC had acted on Petitioner's motion to transfer.

Alexander, the special prosecutor. So O'Quinn took out after Alexander and, finally, was able to convince the State Bar Executive Committee to discharge Alexander. See App. I-14, 15 and 17.[6] As we shall see, infra, it was only a matter of time before the General Counsel would carry out his pre-Alexander deal to give O'Quinn a reprimand.

In the meantime, in this climate of hysteria and highly prejudicial pre-trial publicity,[6A] Petitioner's case was the first

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6. Alexander was called by members of the Executive Committee a "runaway prosecutor" who was employing "vigilante" tactics. See App. I-14 and 15.

6A. Alexander and other officials of the State Bar repeatedly resorted to one of the most vicious of the old tactics of McCarthyism, guilt-by-association. Petitioner and O'Quinn had separate practices and, though they worked together frequently, both had their own separate inventory of cases and sources of business. Every time the Respondent would castigate O'Quinn in the press - about alleged jury tampering, bribery of witnesses, maintenance of runners, etc. - Petitioner would be mentioned as if he were a part of those allegations (when in fact he was not). See App. I-8, 9, 10, 11, 13 and 16. The best example of this was the repeated reference in these press reports to O'Quinn's purported relationship with one James McNeilly, an alleged "runner". The Petitioner would be mentioned in those same articles in the context of the overall "solicitation" prosecution, as if McNeilly had implicated Petitioner, when in fact - as Alexander, his

of the three cases set for trial.[6B] Petitioner sought to have venue changed, see App. P-1, and, in the alternative, to have the jury venire-persons questioned separately concerning the effects upon them of the publicity. See App. P-2. Judge Casseb, the visiting judge appointed for the case and a very hostile judge at that, denied these and all other of Petitioner's pre-trial motions.[7]

Petitioner had been fighting with the

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investigator, Clyde Wilson, and the State Bar officials all knew - Petitioner had never in his life even met McNeilly, much less had any business dealings with him, as O'Quinn apparently had. See App. R. Indeed, Alexander falsely stated to the press that "the three attorneys (referring to O'Quinn, Petitioner and Schwartz) allegedly used a network of runners - *including McNeilly* - to solicit clients at disasters." App. I-9. Alexander knew when he made that statement that Petitioner had never used McNeilley as a "runner", and did not even know McNeilly.

6B. Petitioner's case was set for trial on Nov. 7, 1987. O'Quinn's case was never set for trial and Schwartz' was postponed to July of 1989.

7. Judge Casseb, the *Pennzoil v. Texaco* trial judge, had no sooner been named as judge in Petitioner's case when the Respondent rushed to name Joe Jamail, Pennzoil's lead counsel, as an "expert" against Petitioner. He was not named as an expert in the O'Quinn or Schwartz cases.

State Bar since the middle 1970's; it had been expensive and financially debilitating; it was interfering more and more with Petitioner's ability to effectively represent his clients; and the unrelenting pressure was having a deliterious effect upon his family. Moreover, because of Judge Casseb's adverse rulings, Petitioner was facing trial in a jury environment made highly uncertain by the trial-in-the-press tactics of the Respondent, Committee 4-C and its special prosecutor, Tom Alexander (he was forced to resign just two weeks before Petitioner's trial). See App. I-14, 15 and 17. And he was facing trial before an extremely hostile judge. For all those reasons, Petitioner resolved to settle his differences with the Respondent even though he was not guilty of any of the charges.[8]

On the date of trial, Petitioner naively

8. We have discussed how the "telephone call" cases were frivolous even under the State Bar's own standards. The "solicitation" case was just as frivolous. The Respondent named seven alleged runners. See App. J. But Respondent knew that they were not runners. Three were clients who properly referred Petitioner cases; one was the leader of a legitimate veterans organization who referred cases because of Petitioner's work in the Agent Orange litigation; and two, who had

entered into a compromise with the State Bar (hereinafter "Agreed Judgment"; see App. Q), which provided for a 90-day suspension and a three-year probation. Petitioner's probation could be revoked if Petitioner violated any of the disciplinary rules in the future and if Petitioner violated a clause stating that, for one year, Petitioner would have to refer

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formerly been connected with the National Maritime Union, properly developed business for Petitioner through lawyers, unions and other legitimate organizations and groups (primarily involving foreign plaintiffs). With regard to the seventh, James McNeilly, Petitioner had never met him in his life and had never done business with him in any way. See App. R. In addition, the Petitioner and Respondent had agreed to consolidate the "telephone call" cases with the "solicitation" case, so that Petitioner would not have to bear the expense of more than one trial. But on the date of trial, the Respondent announced "not ready" for trial of the "solicitation" case and moved to postpone it to a later date, thus forcing the Petitioner to the heavy expense of two trials instead of one. Judge Casseb, despite having denied Petitioner's motion for continuance, granted the Respondent's motion. See App. R. The fact is, as born out by subsequent events, Respondent knew then that the "solicitation" case was frivolous and that it would never be ready for trial in that case. See discussion, *infra*. Moreover, *when the* settlement was announced, the Petitioner made it clear he had not pleaded guilty to any charge and that the settlement was a *compromise* and nothing more than that. See App. 18.

out to other lawyers all new cases taken in during that period (this clause will be hereinafter referred to as the "Referral Clause"). The Agreed Judgment included another provision, one that Peti- tioner welcomed and had asked for: the court would appoint a custodian who would have the duty to review all of the cases Petitioner had on hand and, if the custodian found any cases improperly solicited, he was to report them to the court and Petitioner would have to forfeit his fees in those cases. Just how frivolous Respondents' "solicitation" case was, becomes apparent from the fact that, after nine months of reviewing Petitioner's cases, *the custodian did not report a single case as having been improperly solicited.* See affidavit, App. R. This complete exoneration included the cases mentioned so repeatedly in the news articles generated by the Respon- dents' trial-in-the press tactics, such as the Agent Orange, Arrow Air, Bhopal, Ocean Ranger, Liberty Waste Dumpsite, and Dallas/ Ft. Worth aircrash cases. See e.g., I-1 thru 4 (particularly 4), 6-8 and 32.

Petitioner complied assiduously with the terms of the probation but it soon became apparent just what Respondent really had in mind for Petitioner. At the outset, it should be pointed out what the Agreed Judgment did not contain: it did not contain a waiver of the provisions of the State Bar Rules for the handling of any alleged future violation of the disciplinary rules, including the right of trial by jury (see Secs 10-23 of Art. 10 of the State Bar Rules, and Sect. 81.077(a) of the Texas Govt. Code, Judicial Branch); it did not contain a waiver of due process or of Rules 99 and 245 of the Texas Rules of Civil Procedure with respect to minimum time periods for service of petition to revoke probation and appearance by Petitioner (1st Monday after expiration of 20 days from date of service of petition) and for setting of trial on the merits of the petition to revoke (at least 10 days *after* appearance); the Agreed Judgment did not contain a waiver of Petitioner's First Amendment rights and specifically did not require Petitioner to stop using press conferences and the

television in the manner in which he had been doing so in the past;[9] and, finally, the Agreed Judgment did not contain an outline of the precise mechanics as to how Petitioner would have to make referrals during the first year of the probation in order to comply with the Referral Clause.

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9. As mentioned above, Petitioner's modus operandi was to use press conferences and television interviews at or near the scenes of mass disasters or in connection with toxic tort class action litigation (e.g., Ocean Ranger, dumpsite cases and Agent Orange). The press conferences and interviews always took place at least several days ***after*** the accident or event and were targeted toward other lawyers or citizens groups and ***never***, and we emphasize ***never***, toward individual victims or their families. The purpose of these press conferences, in the case of foreign mass disasters such as Ocean Ranger (and Piper Alpha), was to advise solicitors or lawyers in the area of the potential for litigation in the U.S., usually Texas because of its liberal forum non conveniens law. See Sec. 71.031, Texas Civil Practices and Remedies Code and a discussion of it in ***Chick Kam Choo v. Exxon***, 817 F.2d 307, 314-316 (5 Cir. 1987), rev'd, ***Chick Kam Choo v. Exxon***, 100 L.Ed.2d 127 (1988). In the case of toxic tort litigation, the purpose of the press conference was to inform the personal attorneys for members of the particular class, whether the class involved those living around a dumpsite or a group such as the Agent Orange veterans, of their potential rights. Petitioner has never, in his life, advertised for business directly from potential clients, even though such advertising is permitted by Supreme Court law.

The new assault on Petitioner began immediately with the entry of the Agreed Judgment on Jan 29, 1988. Judge Casseb let it be known through one of Petitioner's attorneys that he did not like the fact that Petitioner had held a press conference in connection with the announcement of the Agreed Judgment. See App. R and I-18.[10] Then, in June of 1988, Petitioner participated in a press conference announcing the filing of a new Agent Orange class action suit involving Vietnam Veterans who died or manifested their injuries *after* May 7, 1987, the date the settlement of MDL 381 was tentatively agreed upon. (The new suit will hereafter be referred to as the "Hartman Agent Orange case"). See App. I-19. Steve Smoot, Assistant General Counsel reacted adversely to the Agent Orange press conference, stating he was going to look into

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10. Accepting 90 days suspension and three years probation for unprovable charges was a bitter enough pill for Petitioner to swallow and he was simply trying to mitigate the damage by making it clear to the press that he had not pleaded guilty to any charge, that he was admitting no guilt and that he agreed to the settlement so that he could get the State Bar off his back and get on with his life and his law practice.

the Hartman Agent Orange case, obstensibly on the ground that Petitioner may have violated the Referral Clause.[11]

Then in July of 1988, about ten days after the tragic Piper Alpha disaster, Petitioner and a lawyer from Houston by the name of Kelly Newman met with some Scottish solicitors who had referred cases to Petitioner in the past and who had been hired by some of the Piper Alpha families. Because these solicitors felt that many of the other solicitors were uncertain about potential jurisdiction in the United States and, further, they were concerned about the drive for an improvident package settlement being engineered by a

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11. This of course was ridiculous because Smoot was advised that the Hartman case was referred to Wayne Mansulla of Wash., D.C., which referral was confirmed in writing. See App. S (which were official, uncontradicted exhibits in the revocation trial). Moreover, since Petitioner had been involved as an attorney in the Agent Orange class action litigation since 1980 and was still then the lead attorney in a class action suit involving all Vietnam Veterans pending in the Claims Court of the U.S. (*Sharkey v. U.S.*, Cause No. 697-84C, Claims Court of the U.S.), it was undisputed that Hartman, a member of the *Sharkey* class, was constructively already Petitioner's client when the Agreed Judgment was entered into, thus meaning that his case was not covered by the Referral Clause.

a group of other solicitors working with the American firm of Speiser and Krause, Petitioner and Newman decided to have a press conference and discuss those matters. The press conference was held, see App. 20, and the reaction of the General Counsel's office, the State Bar President and the custodian, Hartley Hampton, was instantaneous, precipitate, hysterical, unprofessional and demonstrated not only a prejudgment without having any of the true facts in hand but confirmed once and for all that what the State Bar had really always wanted to do with Petitioner was to strip him of his First Amendment rights, eliminate his modus operandi which obviously offended the establishment of the Bar, and stop him from utilizing press conferences and television interviews in connection with mass disasters and controversial litigation.[12]

12. See App. I- 21-23. 25 and 26. Smoot, without knowing anything except what he had read in the press, stated that "he would (not *maybe* after proper investigation) be filing a motion with the Court this week to revoke Mr. Musslewhite's probation." App. I-30. James Sales, President of the State Bar (and whose firm, Fulbright & Jaworski, represents the largest subsidiary of Occidental, the target

The *Texas Lawyer*'s analysis of the Repondent's actions homed-in on the underlying motive of the State Bar:

> "In addition to the Piper Alpha activities (referring primarily to the *press conference* in Aberdeen), the Bar's petition (to revoke) cited a June 22 *press conference* in Washington, D.C., where Musslewhite announced his involvement in new Agent Orange litigation . . . . . .

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defendant in the Piper Alpha matter), stated, again only having in hand press reports, that he understood that "a ring of Houston Lawyers" (including Petitioner) were "soliciting clients from the July 6 explosion" and that such group "seemingly has tentacles that may reach back to prior incidents in the U.K., North Sea area." See App. I-25. Sales was then quoted as saying:

> "Sales said that if news reports from Scotland prove to be true, then 'in retrospect the Bar's settlement with Musslewhite was too lenient.' Sales said he has ordered Peterson and first assistant general counsel Steven Smoot to 'marshal all the evidence we can' for the Sept. 19 hearing. If the evidence shows Musslewhite violated the terms of his suspension and probation', Sales said, 'you can bet your sweet bippy the Bar will move to ask for punishment stronger than the Bar's settlement agreement'."

Hampton, the custodian, though having no statutory power to do so, became a self-annointed inquisitor, announced he was launching his own "investigation" and made these strange comments:

> "I can't figure out what he (Musslewhite) is doing', Hampton said Sunday. 'He cannot accept new cases, period. Even if he is meeting with solicitors, he can't do that under the order.. Reports of Musslewhite's actions are disturbing', Hampton said."

See App. I-22. Hampton's construction of the Agreed Judgement is shockingly inaccurate.

> ... News of the *press conference* (in Aberdeen) reached the U.S., *causing bar officials to launch their investigation.*"

See App. I-27; *emphasis ours.*

Obviously because the Petitioner had had the audacity to exercise his free speech rights in the two press conferences involving the Hartman Agent Orange case and the Piper Alpha matter, the Respondent filed a petition to revoke Petitioner's probation on September 13, 1988; Petitioner received notice of same on Sept 14, 1988; and Judge Casseb unbelievably set the trial on the merits of the petition for Sept 19, 1988. See App. T-1, T-2 and T-3.

The petition asserted two essential grounds for revocation: (1) that Petitioner violated the Referral Clause by accepting the Hartman Agent Orange case and (2) Petitioner violated the advertising rule of the Texas disciplinary rules (DR 2-101) by issuing a press release at the Piper Alpha press conference, by an advertisement run by Mr. Newman (over Petitioner's objection) and by a letter sent by Newman (again over Peti-

tioner's objection).[13]

Petitioner immediately filed a motion for continuance, pleading with Judge Casseb to postpone the trial so that Petitioner could have time to secure counsel, conduct discovery as the Agreed Judgment expressly gave him the right to do, prepare for trial and have the due process to which he was entitled. See App. U. But Judge Casseb callously overruled the motion and commenced trial on the merits of the petition to revoke *only* six days after service of the petition.

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13. The *only* three communications relied upon by the State Bar were attached to the petition to revoke as exhibits 1, 2 and 3. (See App. T). Exhibit 1 is a press release. It contains the following statement: "I would stress that my team *will not accept any cases except through Scottish or U.K.-based solicitors.*" Exhibit 2 is an advertisement run by another lawyer, Kelly Newman, not Petitioner. In any event, it states: "We understand that the Scottish Law Society has warned against directly employing U.S. attorneys and our team agrees with those suggestions. *It is our policy not to take any cases except through Scottish or U.K. solicitors.*" Exhibit 3 is a letter to victims, also sent by Kelly Newman, not Petitioner. It states: *"We will not accept any cases except through your own solicitor or lawyer.* The purpose of this letter is to ask that if you have already retained a solicitor to let us know who that solicitor is so that we can discuss the suit ... with him."

Petitioner also filed a plea in abatement, asking Judge Casseb to abate the proceedings until the Piper Alpha allegations could be processed through the grievance committee, with subsequent right of trial by jury, all as required by Secs. 10-23 of Art. 10 of the State Bar Rules. See App. V. Again, Judge Casseb summarily rejected such plea. Thus, the State Bar had what it wanted: a swift trial *without* a jury, before a judge extremely hostile to Petitioner, one who would give them the kangaroo court they so badly wanted, and the Constitution of the United States be damned.[14]

Judge Casseb did indeed do exactly what the State Bar wanted him to do. Even though the Referral Clause clearly had not been violated and the communications complained-of in connection with the Piper Alpha matter were clearly protected by the First Amendment, he revoked probation and suspended Petitioner for the maximum he could under the Agreed Judgment, for three years. See App. A.

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14. The record speaks for itself. It is no exaggeration to characterize Judge Casseb as

Petitioner immediately filed a request for supersedeas of Judge Casseb's harsh judgment but of course Judge Casseb summarily, and without conducting an evidentiary or formal hearing, denied that request, as with all others ever made by Petitioner. See App. W (Rule 47 motion) and App. B (order overruling same). The primary basis of the Rule 47 Motion was that Texas' rule providing for blanket denial of supersedeas where an attorney has been suspended by the trial court (Sec. 24 of Art. 10 of the State Bar Rules) violates the due process and equal protection clause of the Fifth and Fourteenth Amendments and also perhaps violates the Eighth Amendment.

Petitioner duly perfected his appeal on the merits of the revocation trial to the Fourteenth court of appeals of Texas, where the appeal on the merits is presently pending. See excerpts from Petitioner's brief in the state court of appeals, App. EE.

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hostile and the revocation proceedings as a "kangaroo court". See *Ciechon v. City of Chicago*, 686 F.2d 511, 521, 522 (7 Cir 1982). If his actions during the underlying proceeding were merely harsh, his actions during the revocation trial were clearly brutal.

Because Petitioner is suspended pending the outcome of that appeal, Petitioner twice requested the state court of appeals to expedite the handling and disposition of the appeal but, for reasons not explained, the court of appeals refused to expedite, despite knowing that Petitioner is unjustly suspended during the appeal process. See App. X and Y.

Meanwhile, Petitioner pursued the only remedy provided by Texas law in order to appeal from Judge Casseb's erroneous denial of Petitioner's Rule 47 motion, namely a direct motion to the state court of appeals pursuant to Rule 49(b) of the Texas Rules of Appellate Procedure. See App. Y. This motion was also denied by the state court of appeals, again without any explanation. See App. F.

Petitioner thence followed the next step available to him, and that was filing a petition for writ of mandamus in the state supreme court, with a companion motion that the petition be expedited. See App. Z.[15]

15. Rule 49 does not contain any express procedure to follow after refusal by the court of appeals of a Rule 49 motion. The trial

Inexplicably, the supreme court of Texas sat on the petition for nearly three months (though it normally acts on petitions for mandamus within a few days) and, again without any explanation, summarily denied the petition, all the while having the audacity to state it was "granting" Petitioner's motion to expedite. See App. G (Copy of order dated June 14, 1989).[16]

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court's denial of supersedeas does not constitute a final judgment on the merits which would entitle the parties to go up to the supreme court of Texas by way of application for writ of error pursuant to Rule 130, T.R.A.P. (applies only to review of "final judgments"). Therefore, the only remedy available to Petitioner, to get an immediate consideration of the question of the constitutionality of Sec. 24 of Art. 10 of the State Bar Rules, was to petition for mandamus pursuant to Rule 121, T.R.A.P., which is what Petitioner did.

16. The reason the unusual delay by the supreme court of Texas was severely damaging to Petitioner is that, on May 2, 1989, 90-days of suspension had gone by. Petitioner is in the process, through direct attack in the state court (by way of bill of review) and through an action under the Civil Rights Act, of attempting to set aside the Agreed Judgment, which imposed the 90-day suspension in the first place. But, conceding *arguendo* the outstanding effect of the Agreed Judgment, it might be possible for Respondent to argue that Petitioner would not suffer any irreparable harm, by being suspended pending appeal, *until* the 90-days provided for in the Agreed Judgment had gone by. But, even conceding, again *arguendo*, the viability of

It is from the order of the supreme court of Texas, denying the Petitioner's petition for writ of mandamus with regard to the unconstitutionality of Sec. 24, Art. 10 of the State Bar Rules, as written and/or as applied in this case, that Petitioner is perfecting this petition for writ of certiorari.[17]

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that argument, there can be *no* doubt that Petitioner has been suffering irreparable harm since May 2, 1989, and it is extremely disturbing to Petitioner that neither the state court of appeals, which will not expedite the appeal on the merits, nor the state supreme court, which did not expedite the petition for mandamus, has shown any equitable concern about the irreparable harm Petitioner is suffering.

17. In the initial stages of the appeal from the revocation judgment, Petitioner sought a mandamus concerning the supersedeas question from the state court of appeals, thence the state supreme court, and thence a One-Justice Stay, pursuant to 28 U.S.C. 2101(f), from Fifth Circuit Justice Byron White. All these were denied, see App. C, D and E, apparently because Petitioner had not yet, when all those petitions were filed, exhausted his remedy in the state court of appeals under Rule 49(b), T.R.A.P. Petitioner then perceived that such petitions were premature, as made clear by this Court in ***Pennzoil v Texaco*** 95 LEd2d 1 (1988)(holding that, because the state court appellant had not exhausted all its remedies in the state court, the relief it sought with regard to supersedeas pending an appeal on the merits, would be denied. 95 L.Ed.2d at 16-18). *It is now undeniably clear that Petitioner has completely exhausted every possible remedy and that this Petition is both properly filed within the meaning of Pennzoil v Texaco and timely filed.*

In connection with the supersedeas issue, it should be noted that, though challenged by Petitioner both before and after judgment (by way of petition for injunction *before* and the Rule 47 Motion *after*), Respondent offered no evidence or proof, either before or after judgment, which would show or tend to show that Petitioner is an "immediate and substantial threat of irreparable harm" to his clients or the public, so as to justify interim suspension under Sec. 22 of Art. 10 of the State Bar Rules. See App. R. The procedure outlined in Sect. 22 was available to the Respondent to establish a possibly reasonable police power basis for taking Petitioner's valuable property right - pending appeal. Not only did Respondent not make any effort to offer any evidence to satisfy Sec. 22 for the obvious reason none existed but Judge Casseb implicitly found that Petitioner was *not* a threat to his clients and that no state or police power reason existed for depriving Petitioner of his license pending appeal, because Judge Casseb deferred the effective date of Petitioner's suspension so

that Petitioner could take care of important cases (such as the Reese case). See App. A, the judgment of suspension; App. AA-1, excerpts from the official record in the trial court; App AA-2, Petitioner's motion to defer suspension, which was granted in part; and App. AA-3, excerpts from Respondent's brief in the state court of appeals demonstrating that it has never contended that Petitioner constituted a threat of "irreparable harm" to his clients or to the public. Moreover, it was undisputed that neither the allegations in the underlying proceedings nor the allegations in the revocation proceedings involved moral turpitude or any ground which would justify interim suspension under Sec. 26 of Art. 10 of the Texas Bar Rules.

One more matter deserves mention before passing on to the "Reasons for Granting the Writ". We have mentioned above how the so-called solicitation allegations in the underlying proceedings were shown to be frivolous by the Respondent's refusal to go forward on those allegations when the underlying cases

were set for trial and by the failure of the custodian to find a single case that Petitioner had improperly solicited. If there could still be any doubt that the underlying suit was unjustly filed, that doubt must dissipate in the face of what occurred in July of this year. The General Counsel did indeed carry out his resolve to make O'Quinn a "sacred cow" and settled with him, despite allegations much more serious than those asserted against Petitioner, for a reprimand, a $38,000 fine and 100 hours of community service. See App. I-29 and 30. What was very revealing, Mr. Alexander correctly referred to the settlement as a "wrist-slap", App. I-29, and one of the members of the grievance committee stated that the General Counsel reported to them that he had to settle with O'Quinn, after all these years, because the solicitation case probably could not be won. See App. I-30. Again we note that the solicitation charges against O'Quinn were the same charges made against Petitioner, except that O'Quinn's were more serious. Compare App. J to App. K. Schwartz was also given a wrist-

slap. See App. I-31.

Probably the darkest side of this entire episode is a factor that has now become disgracefully obvious: money made the difference. As *The Texas Lawyer* article disclosed, App. I-30, O'Quinn spent "about $3 million on the case" and thus apparently intimidated the General Counsel, who said:

> "I'll do what you all say but this guy (O'Quinn) can outspend the Bar and I'm facing [five] highpowered lawyers ... (t)he bottom line is that it (giving O'Quinn a wrist-slap) came down to economics."

App. I-30, p. 17.[18]

The so-called crusade against "unsavory solicitation" was thus finally stripped of its pretense and shown for what it always was - a charade; a hypocritical soul-cleansing; a political maneuver by the insurance

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18. What all this revealed is that one of the primary reasons Benton Musslewhite was selected as the scapegoat was that he did not have the money to hire "five high-powered lawyers". Ironically, this Court commented upon this very factor as recently as about two months ago in ***Texas v Johnson*** 57 U.S.L.W. 4770 (1989). The Court stated that, in regulating speech and expression in the face of the First Amendment, the state "must demonstrate its commitment to advancing this interest by applying its prohibition ***evenhandedly***, to the small time disseminator as

company-petrochemical-manufacturing interests to help them with "tort reform"; a soap-box for the envious, the self-righteous, those with a vigilante complex, willing to crucify others for the sake of their own misguided goals; and, most of all, a vendetta against Benton Musslewhite - not really because they deemed him to be unethical - but because he was a high-profile, unorthodox, controversial, crusading, political liberal who used a press conference-television methodology that offended them and their insurance company clients and because he was financially strapped and thus an easier target. The whole despicable circus made a mockery of justice and our Constitution and hurt a lot of people.[19]

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well as the media giant." 57 USLW at 4820. By the same token, the State Bar of Texas should prosecute the members of its Bar evenhandedly, and a member who has been accused of far worse deeds than another should not be given a "wrist-slap" because he is rich, while the other is given maximum punishment because he is relatively poor.

19. Gloria Chaplin testified in the state trial court as to how she wanted Petitioner to try the Liberty Waste dumpsite case, set for May of 1989, but that it had to be tried by other lawyers because of Petitioner's improvident suspension. While the other lawyers did a good job, Ms. Chaplin felt that Petitioner would have gotten a better result and

Finally, the "scapegoat-sacred cow" approach to "lawyer discipline" dominated the revocation proceedings just as it had the underlying proceedings. Kelly Newman, though he was more heavily involved than Petitioner in the three communications made the basis of the Piper Alpha allegations,[20] was not prosecuted at all, while the State Bar sought to suspend Petitioner for the maximum term of three years. See App. R, Petitioner's Affidavit.

Despite the fact the Petitioner raised in the trial court the violation of his equal

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that the State Bar wronged her by improperly depriving her of the counsel of her choice. She filed a grievance against grievance committee 4-C because they forced her to come before them without Petitioner, her then attorney, being present, but with a partner of Baker & Botts (the firm that represented Exxon Corp in the *Liberty Waste* case) present as a member of the grievance committee. Ms. Chaplin stated that the grievance committee attorneys attempted to denigrate Petitioner and tried to get her to discuss the merits of the *Liberty Waste* case. Ms. Chaplin filed her grievance in 1986 and, of course, she has never heard a word about it. See App. BB, the affidavit of Ms. Chaplin filed in the state court of appeals, and excerpts from her testimony in the state court.

20. Petitioner and Newman were equally involved in the press release prepared for the press conference. Newman was much more

protection rights, the Respondent made no effort to offer any proof which would satisfy its burden to establish a rational state basis for prosecuting Petitioner and not Newman and for the disparate, discriminatory treatment between Petitioner and O'Quinn.[21]

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heavily involved in running the ad and sending the letter. Indeed, he prepared and ran the ad and sent the letter (neither of which mentioned Petitioner by name) over Petitioner's objections. See App. CC, excerpts of testimony of Petitioner and Newman in the trial court.

21. There were a number of other examples of selective prosecution and enforcement. For example, James McNeilly, the alleged star witness of the Respondent's solicitation case (a man whom, as we stated above, Petitioner did not know and had never met), according to Mr. Alexander had been a "runner" for "eight Houston lawyers" *other* than Mr. O'Quinn. See App. I-9. The initial "investigation" was of 17 Houston lawyers. See I-3 and 4. Neither the State Bar nor Mr. Alexander prosecuted any of these *other* lawyers. See App. R. Mr. O'Quinn was also involved in the Piper Alpha episode (he was on the "team" referred to by Newman) and he, also, was not prosecuted about the Piper Alpha matter. In addition, according to Mr Harrington of the Texas Civil Liberties Union, discrimination against the solo practitioner and in favor of the large corporate firms is pervasive with regard to the Texas disciplinary system. See App. DD. Even the Texas supreme court has raised the unequal protection flag - particularly with regard to "solicitation" prosecutions - by suggesting that large firms have virtual immunity while the solo plaintiffs' attorneys are selectively prosecuted. See ***O'Quinn v. State Bar of Texas***, 763 S.W.2d 397,404 (Tex. 1988).

II.

REASONS FOR GRANTING WRIT OF CERTIORARI

A. Sect. 24, Art. 10 of the Texas State Bar Rules Is Unconstitutional As Written And/ Or As Applied In this Case.

Sec. 24, Art. 10 of the Texas State Bar Rules provides:

> Either party to a disciplinary action shall have the right of appeal to the Court of Appeals but, if the judgment appealed from be one suspending or disbarring the respondent, he or she shall not be entitled to practice law in any form while the appeal is pending and shall have no right to supersede the judgment by bond or otherwise. (Adopted Feb. 29, 1984, eff. March 1, 1984.)

Mr. Smoot, Assistant General Counsel of the State Bar, argued that Sec. 22 constitutes a ***blanket*** prohibition against supersedeas pending appeal of a trial court's judgment of suspension. According to the State Bar, Sec. 22 commands the trial court judge to deny supersedeas regardless of the circumstances and leaves absolutely no discretion in the trial court judge to grant supersedeas. See also App AA-3. Judge Casseb, as did the Texas court of appeals and the Texas supreme court, accepted Respondent's

construction of Sec. 24.

Thus, if the suspension is only for thirty days, the lawyer suspended will have to "serve his time" before he can possibly complete his appeal and, therefore, his right to appeal will have been effectively nullified by Sec. 24, even though he may eventually win the appeal. This apparently happened in ***Daves v. State Bar of Texas***, 691 S.W.2d 784 (Tex.App.- Amarillo 1985).

In Petitioner's case, he is facing this same oppressive and hopeless mootness, at least in substantial part. Petitioner perfected his appeal in Dec. 1988 and here it is ten months later, and the intermediate court of appeals has not even set the appeal on the merits for oral argument, in the process having twice refused Petitioner's request for expeditious and accelerated treatment of his appeal. These refusals to expedite have taken place even though the state court of appeals knows that Petitioner is suspended pending appeal and suffering devastating, day-to-day, irreparable harm. Based upon reasonable estimates, it will be

another 16 to 24 months before the court of appeals finally sets the case for oral argument, hears the arguments and then publishes its opinion and the Petitioner, if he loses in the court of appeals, applies for writ of error in the supreme court, writ is granted, arguments ensue and the supreme court finally issues its opinion. By that time, Petitioner's appeal on the merits will obviously have become virtually moot in that Petitioner will have been suspended for almost the full term of three years. And then when Petitioner wins his appeal on the merits, how does he get back those almost three years he will have been unjustly suspended? That time is gone forever. Considering Petitioner's age, 58, and such a long hiatus, it is doubtful that he will be able to restart his practice or afford the building time required to regenerate his practice. The General Counsel and the State Bar establishment will have then unconstitutionally accomplished what they have tried to do for twelve years - put Petitioner completely out of the legal business.

And there will be no legal remedy for all this. If Petitioner sues the State Bar, Mr. Peterson, Sales, et al for damages they undoubtedly will cloak themselves with immunity and/or qualified immunity and Petitioner's burden will indeed be heavy, possibly insurmountable, to overcome such defense. How can a judicial system with such a great constitutional tradition let this kind of thing happen? It is happening in this case because - even though Petitioner had been suspended on hypertechnical grounds, such as violations of the advertising rules; had not been shown to be guilty of any disciplinary rule involving moral turpitude; had not been shown to constitute a threat to his clients or the public; and his appeal on the merits of the judgment of suspension clearly presented "fair grounds for litigation" - ***the Texas courts, in view of the terms of Sec. 24, still did not have the discretion to give the suspended Petitioner supersedeas pending an appeal he is going to win.***

It is clear, therefore, that Section 24 is unconstitutional and violates the Peti-

tioner's right to an effective appeal and thus is in conflict with the Fourteenth Amendment to the Constitution of the United States. In addition, the refusal to allow supersedeas when the state has not shown any permissible police-power reason for not allowing supersedeas, constitutes a taking of Petitioner's property, namely his right and license to practice law, without due process of law, in violation of the Fifth and Fourteenth Amendments. Such action may also violate the Eighth Amendment concerning excessive fines and bail.

The discussion of the unconstitutionality of the Texas supersedeas statutes in *Texaco v. Pennzoil Co.*, 784 F.2d 1133 (2 Cir. 1986), rev'd on other grounds, *Pennzoil v. Texaco*, 95 L.Ed.2d 1 (1987), is relevant to this case. The court of appeals stated:

> "The Texas Constitution grants a right of appeal to all civil and criminal litigants. *Nelson v. Krusen*, 677 S.W.2d 918, 921 (Tex. 1984); *Airco Inc. v. Tijerina*, 603 S.W.2d 785 (Tex. 1980); *Bay v. Mecom*, 393 S.W.2d 819, 820 (Tex. 1965); *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303, 304-305 (Tex. 1890); *Moore v. Wutke*, 145 S.W.2d 224, 226 (Tex.App. 1940). ***Federal due process forbids the state from arbitrarily excluding certain parties from***

that right. Evitts v. Lucey, 105 S.Ct. 830, 840, 83 L.Ed.2d 821 (1985); *Griffin v. Illinois*, 351 U.S. 12, 17-20, 76 S.Ct. 585, 589-591, 100 L.Ed. 891 (1956). ***Furthermore, due process requires that, once the state has created a right of appeal, it must 'offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal'.*** *Evitts, supra. See also, Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430 n.5, 102 S.Ct. 1148, 1154-1155 n.5, 71 L.Ed.2d 265 (1982). ***A state would deny a defendant such a fair opportunity if it reduced the appeal to a meaningless ritual*** by denying him the means effectively to press his appellate arguments. *Douglas v. California*, 372 U.S. 353, 358, 83 S.Ct. 814, 817 (1963). It is self-evident that an appeal would be futile if, by the time the appellate court considered his case, the appeal had, by application of a bonding law, been robbed of any effectiveness. Cf. *National Socialist Party v. Skokie*, 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977); *Nebraska Press Assn. v. Stuart*, 423 U.S. 1319, 1324-1325, 96 S.Ct. 237, 239-240, 46 L.Ed.2d 199 (1975, Blackmun, J., in chambers); *Times Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305, 95 S.Ct. 1, 3, 42 L.Ed.2d 17 (1974)(Powell, J., in chambers); *Graves v. Barnes*, 405 U.S. 1201, 1203, 92 S.Ct. 752, 753, 30 L.Ed2d 769 (1972)(Powell, J, in chambers).

Thus, ***an inflexible requirement for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the full amount is posted can in some circumstances be irrational, unnecessary and self-defeating, amounting to a confiscation of the judgment debtor's property without due process.*** A serious question presenting fair grounds for litigation is therefore raised by Texaco's claim the enforcement of Texas' lien and bond requirements would reduce its appeal to a meaningless ritual. Since Texaco would be bankrupt or in liquidation by the

> time its appeals were decided the hardship to it would be immeasurable, irrevocable and irremedial by reversal of the judgment on the merits." 784 F.2d at 1154.

(Emphasis ours).[21A]

As we pointed out above, the irreparable harm that is occurring to the Petitioner in this case is certainly on a day-by-day basis. See discussion of "day-by-day" harm in *Nebraska Press Assn. v. Stuart*, 423 U.S. 1327 (1975)(per Blackmun, J., in chambers). Moreover, it is quite clear that the Petitioner has no adequate remedy at law unless this Court decides the supersedeas issue now, because once the appellate process is completed on the merits of the suspension judgment, regardless whether Petitioner wins or loses, the supersedeas issue will have become moot. See ***Heard v. The State Bar of Texas***, 603 S.W.2d 829 (Tex. 1980).

21A. This Court, though reversing the court of appeals, did not reject the above statement of the law. The Court reversed on the ground that the district court erred in not abstaining pursuant to the *Younger* doctrine. See *Younger v. Harris*, 401 U. S. 37 (1971) (because Texaco had not exhausted all remedies in the state court concerning supersedeas or other similar relief). This Court noted that it was expressing no opinion on the "federal constitutional claim". 95 L.Ed.2d at 16, 18.

The key to the unconstitutionality of Sec. 24 is its "inflexibility."[22] Its rigid preclusion of supersedeas is not tied to constitutionally acceptable criteria. Judge Casseb accepted Mr. Smoot's argument that the statute constitutes a blanket ban on supersedeas once an attorney has been suspended at the trial court level. Judge Casseb rejected the argument of Petitioner that Sec. 22 provided the only constitutionally acceptable criteria for dealing with a request for supersedeas following a judgment of suspension.

Texas does provide in Sections 22 (providing for interim suspension where attorney shown to constitute an immediate threat of harm to clients or the public) and 26 (providing for interim suspension where attorney shown to have been convicted of a

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22. Not only did the court of appeals in *Texaco v Pennzoil* discuss how an "inflexible" prohibition against supersedeas is usually constitutionally fatal but the district court, 626 F.Supp. 250 (S.D.N.Y. 1986), also noted that where there is "no discretion" in the state court to grant supersedeas, such anti-supersedeas statutes (Sec 24 in this case) should probably be condemned as unconstitutional. 626 F.Supp. at 256, 257.

crime of moral turpitude) possible constitutional bases for suspending an attorney before his disciplinary case has become final after all appeals have been exhausted. It is undisputed that the Respondent did not comply, and made no attempt to comply, with either one of these sections.

Absent compliance with either Section 26 or 22, there simply is no police power justification for taking the Petitioner's license pending his appeal on the merits. ***People v. Treadmill***, 5 P. 686 (Calif. 1885); ***In re Ricardi***, 189 P. 694 (Calif. 1920); ***State ex rel Larew v. Sale***, 87 S.W. 967 (Miss. 1905); ***Louisiana State Bar Assn. v. Ehmig***, 277 So.2d 137 (La. 1973); ***In re Ming***, 469 F.2d 1352 (7 Cir. 1972); ***Willner v. Committee on Character and Fitness***, 373 U.S. 96, 10 L.Ed.2d 224 (1963); ***Schware v. Bd. of Bar Examiners***, 353 U.S. 232, 1 L.Ed.2d 796 (1957); ***United States v. Friedland***, 502 F.Supp. 611 (D.C., N.J. 1980).

Indeed, in a case that is not precisely analogous, but sheds some light upon the question, ***In re Ming, supra***, the court struck

down as unconstitutional the application of a state bar rule to a particular attorney which provided that an attorney, who has been convicted of a crime, could be suspended pending the appeal from the criminal conviction. The court stated:

> All we say is that if the conviction itself is to be used to show that the appellant actually committed the underlying acts which are of such a nature as to form the basis for disbarment or suspension, *that conviction must have reached finality, at least to the extent of exhaustion of direct appeals.* Since appellant has the possibility of filing for a writ of certiorari in the United States Supreme Court, we do not think that the affirmance of his criminal conviction by this court moots this point.

469 F.2d at 1354. A contrary view is taken in ***United States v. Friedland***, ***supra***, but only because the ***Friedland*** case involved a *felony conviction involving moral turpitude*, whereas the ***Ming*** case involved a misdemeanor. The point in ***Ming***, with which ***Friedland*** did not disagree, is that there is no reasonable basis for suspending an attorney pending an appeal from his criminal conviction where it is not clear that the public might suffer some harm during the period of the appeal.

US v. ***Friedland*** makes this point extremely

clear. Citing the case of ***State v. Yormark***, 117 N.J.Super. 315, 284 A.2d 549 (App.Div. 1971), cert den. 60 N.J. 138, 286 A.2d 511, cert den sub nom ***Mulvaney v. New Jersey***, 407 U.S. 925 (1972), the ***Friedland*** Court noted that in ***Yormark*** the attorney who had been convicted of a crime was "permitted to practice following his conviction until exhaustion of the New Jersey appellate process." *Id.* at 618. During the time that the appeal was pending the defendant attorney "disappeared with a large amount of clients' funds." The Court in ***Friedland*** noted that, after such experience, the State Bar of New Jersey took the following action:

> Since the time of the Yormark proceedings the New Jersey Supreme Court had promulgated an extensive revision of that state's attorney disciplinary procedures, N.J.R. 1:20 et seq., *and provision is (now) made for prompt suspension of an attorney where necessary to protect the interests of an attorney, client or the public*. N.J.R. 1:20-3(i).

Id. 502 F.2d at 518, n.12; emphasis ours. As the Court in ***Friedland*** made clear, the above referred-to amendment was designed to provide the means - *and the only means* - whereby the New Jersey Bar could properly and reasonably,

in the face of the Constitution of the United States, *suspend an attorney pending an appeal from a suspension order.*

It goes without saying that N.J.R. 1:20-3(i) of the New Jersey State Bar Rules is almost precisely identical to Section 22 of Article 10 of the Texas State Bar Rules. What cannot be denied, is that what the court in ***Friedland*** is saying is that New Jersey has recognized that, in order to constitutionally suspend an attorney pending appeal, a State Bar must *first* show that an immediate suspension is necessary because such attorney poses a threat to his clients or to the public. To be precise, unless the State Bar of Texas takes action to have an attorney declared such a threat pursuant to Sec. 22 (which is similar to N.J.R. 1:20-3(i)), the State Bar cannot constitutionally enforce suspension pending an appeal.

Putting the same proposition another way, the right to practice law has always been considered by this Court and the Texas courts as a valuable property right. See *In re Ruffalo*, 390 U.S. 544 (1986) and *Sizemore v.*

State Board of Dental Examiners, 747 S.W.2d 389 (Tex.App.-Dallas en banc, 1987), rev'd on other grounds, 759 S.W.2d 114 (Tex. 1988).[22A]

As Professor Antineau points out in his Treatise, *Modern Constitutional Law, The Individual and Government*, the "federal government, under the Fifth Amendment, and the states, under the Fourteenth Amendment, can regulate the use of private property, whenever such regulation is reasonable, and *reasonably* related to the public health, safety, morality or general welfare. It is ... *unreasonable*, arbitrary or capricious interference with the use of property that is unconstitutional." Volume 2, Sec. 3:1 at p. 206; emphasis added.

As Justice Brennan stated in a separate opinion in *Zauderer v. Office of Disciplinary*

22A. The Court in *Sizemore* stated that the "right to practice a profession has been called a property right, but it is more. ... There is moreover a prestige of good name and should be a pride attached to the practice of an honorable profession superior to any material possessions. To cancel a professional license is to take the entire capital stock of its possessor and leave him in most instances the equivalent of bankrupt. But it does more than this: it takes from him his professional standing and in a manner, whatever good name he has, which leaves him poor indeed. ..." 747 S.W.2d at 389.

Counsel of the Supreme Court of Ohio, 471 U.S. 616, 85 L.Ed.2d 652 (1985):

> 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, due process guarantees must scrupulously be observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971). See also, *Board of Regents v. Roth*, 408 U.S. 564, 573, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972)(same with respect to any charge. ... that might seriously damage [a person's] standing and associations in his community). *Paul v. Davis*, 424 U.S. 693, 722-723, 74 L.Ed.2d 405, 96 S.Ct. 1155 (1976)(Brennan, J., dissenting)('the enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal liberty').

85 L.Ed.2d at p. 684.

Thus, there can be no doubt that a statute such as Sec. 24, particularly as applied in this case, constitutes a taking of Petitioner's valuable property right without due process of law and it is punitive and harsh, so harsh that it may exceed the constitutional threshhold under the Eighth Amendment. See *Solemn v. Helm*, 77 L.Ed.2d 637 (1983).

Finally, it appears that even a convicted criminal in the State of Texas has more rights than an attorney, if the criminal

defendant has not been sentenced to more than fifteen years in the penitentiary. Such convicted defendants have the constitutional right to obtain a supersedeas bond pending appeal while the Petitioner does not. See Article 44.04 of the Texas Code of Criminal Procedure. Certainly, Equal Protection would require that an attorney who has not been convicted of any crime of moral turpitude; who has not been shown to be an immediate threat of harm to his clients or to the public; and who has shown probable success of his appeal on the merits, should be entitled to the same rights as a convicted criminal of having supersedeas while he presses his case on appeal. See *Lindsey v. Normal*, 405 U.S. 56, 77 (1972) (opportunity for appeal "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause").

We must also note that the manner in which Judge Casseb summarily denied supersedeas, without a reasonable hearing with reasonable notice, also violated Petitioner's constitu-

tional rights to due process. See ***Fuentes v. Shevin***, 407 U.S. 67, 32 L.Ed.2d 556 (1972) (holding that the right to have a hearing *before* property of any type is taken from the possessor, is a right guaranteed under the Due Process Clause) and ***Attorney Grievance Commission of Maryland v. Reamer***, 379 A.2d 171 (Md.App. 1977)(holding that a state bar rule, involving interim suspension requires that the attorney in question, *before* he can be deprived of his right to practice law, must be given notice and opportunity to show cause why his conviction did not involve moral turpitude).

The "hearing" that was constitutionally required was an evidentiary one, where the State Bar would assume its burden of proving some justifiable police-power reason for taking Petitioner's license pending appeal. This Court stated in ***Zauderer*** that where a state seeks to restrict the exercise of rights under the Bill of Rights it has the burden of proving and mustering "record evidence" showing that such restriction is a reasonable exercise of the state's police

power. 85 L.Ed.2d at 699, 671. See also, ***In the Matter of R.M.J.***, 455 U.S. 919, 202, 85 L.Ed.2d 674, 678 (1982), also 455 U.S. 200 n.11 (state must justify restriction in light of "experience"); ***Central Anderson Gas v. Public Service Commn***, 447 US 557, 570 (1980); ***Bates v. State Bar of Arizona***, 433 U.S. 350, 381 (1977); ***Linmark Associates, Inc. v. Township of Willingboro***, 431 U.S. 85, 52 L.Ed.2d 155 (1977)("The record here demonstrates that respondents failed to establish that there restriction is needed"); ***Virginia Pharmacy Bd v. Virginia Consumers Council***, 425 U.S. 748, 769 (1976)(Commonwealth's justifications failed on "close inspection"). See also ***Metromedia, Inc. v. San Diego***, 453 U.S. 490, 528, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981)(Brennan, J., concurring in judgment).

The truth is, the very basis of Sec. 24's unconstitutionality-its automatic, inflexible denial of suspension - precludes such a hearing because a trial judge has nothing to hear. And that fact in itself elucidates further why Sec. 24 is so fundamentally unconstitutional.

B. The Harmful Consequences Of Suspending Petitioner Pending Appeal Are Exacerbated By The Fact That Petitioner Is Going To Win The Appeal On The Merits (Or At The Very Least There Is "Fair Grounds For Litigation")

There really can be no serious doubt but that Petitioner is going to win the revocation judgment appeal. At the very least "fair grounds for litigation" exist. Since the object of this Petition is not the merits of the revocation judgment appeal but the unconstitutionality of Sec. 24 and the failure to grant supersedeas, we will only briefly discuss the constitutional questions involved in the revocation judgment appeal.[23]

1. Giving Only Five Days Notice of the Revocation Petition and Trial on the Petition Constitutes Gross Abuse of Due Process Rights.

This Court, as far back as the turn of the century, stated:

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a

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23. We are attaching excerpts from the Original Brief and the Supplemental Brief filed in the state court of appeals as App. EE. These Briefs contain specific citations to the official record presently situated in the state court of appeals.

> singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Davidson v. New Orleans*, 96 U.S. 97, 24 L.Ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701-712, 28 L.Ed. 569-573, 4 S.Ct. 663 .... An ordinary summons, however, to answer the suit of a private individual, contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and the preparation of his defense ... and therefore, in general, *several days should intervene between the time of summons and hearing.* In the superior courts, in general, *at least eight days* notice of inquiry and of trial are essential for the preparation of the defense."

Roller v. Holly, 176 U.S. 398, at 409, 410 (1900); emphasis ours. This Court thus indicated that eight days notice would constitute the bare minimum for due process and, depending on the circumstances, a longer time period could very well be necessary. Because the five days notice given in *Roller v. Holly* did not provide the defendant with due process, the Court ordered "that the judgment obtained upon such (5 days) notice was not binding upon the defendant Roller..."

Id. at 526.[23A]

A more devastating combination of procedural Due Process violations and deprivations could not be imagined than those that occurred in this case: a grossly inadequate notice in terms of time;[23B] no content notice of the provisions of the Disciplinary Rules upon which the Respondent intended to rely; Petitioner forced to commence the trial without counsel; and the failure to allow meaningful discovery prior to commencing and

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23A. See also, ***Armstrong v. Manzo***, 280 U.S. 545, 14 L.Ed.2d 62 (1965) (holding that where a party has been deprived of procedural due process, all proceedings and judgments rendered following such deprivation must be "set aside" and the trial court must "consider the case anew," 14 L.Ed.2d at 66, 67). And see ***Mullane v. Central Hanover Bank***, 339 U.S. 306, 94 L.Ed. 865 (1949); ***Goldberg v. Kelly***, 397 U.S. 254, 25 L.Ed.2d 287 (1970); ***Atkins v. Parker***, 472 US 115, 86 L.Ed.2d 81 (1985); ***Zauderer***, 85 L.Ed.2d at 685 (adequate notice not only requires a reasonable notice in terms of time but also in terms of content; "under the Due Process Clause, 'reasonable notice' must include disclosure of 'the *specific* issues [the party] must meet'", citing *In re Gault*, 387 U.S. 1, 18 L.Ed.2d 527 (1967)).

23B. Indeed, the failure to give Petitioner 20 days notice of the revocation petition and 10 days notice of the trial thereon blatantly violated Rules 49 and 245, Tex.R.C.P., respectively.

concluding the trial.

2. Failure to Process Piper Alpha Allegations Through the Grievance Committee and Allow Trial by Jury Thereon *Before* Utilizing Revocation Procedures, Violates Due Process Rights of Petitioner.

Sects. 10-23 of Art. 10 of the State Bar Rules establishes the procedural rights of all Texas lawyers charged with any alleged violation of the Texas Disciplinary Rules. Sec. 16(I) specifically provides that such lawyers will have the right of trial by jury. And see Sect. 81.077(a) of the Texas Govt. Code.

This Court has consistently held that, while a trial by jury in civil cases in the state courts may not be constitutionally guaranteed, once that right or any other procedural right (such as the hearing before the grievance committee) is given to a class (such as Texas lawyers), the doctrine enumerated in the landmark case of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed.2d 265 (1982), comes into play (holding that once a state has made access to an administrative and court scheme an entitlement or a necessity, the state may not deprive anyone

of the benefits of that scheme without violating the Due Process and Equal Protection Clause. 71 L.Ed.2d at 723-725.). See also, *Evitts v. Lucey*, 105 S.Ct. 830 (1985) and *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891 (1956). Therefore, the court below violated Petitioner's constitutional rights when it refused to refer the Piper Alpha allegations to the grievance committee for processing there, thence with the right of trial by jury should Petitioner be dissatisfied with the determination of the grievance committee.[23C]

23C. The Respondent has taken the position that the Petitioner waived his right to trial by jury on the Piper Alpha matter because the Agreed Judgment stated that the revocation trial could be conducted "without the aid of a jury." However, in Texas the right to trial by jury is constitutional, *White v. White*, 196 S.W.2d 508 (Tex. 1917), and a lawyer's right to trial by jury is thus protected by the U.S. Constitution under the *Logan* doctrine. Anticipatory waivers of such fundamental rights are generally not permitted. See *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Zeesell Realty Co. v. Cunningham*, 211 N.Y.S. 591, 592 (N.Y.Sup. 1925)(cannot anticipatorily waive right of trial by jury where "such an anticipatory provision is not one of the methods expressly defined by statute by which a right to a trial by jury may be waived"); and see *Frierson v. Realty Corp.*, 54 N.Y.S.2d 243 (City Ct, N.Y. 1945). There is no statute or rule in Texas expressly

3. By Prosecuting the Petitioner for Communications Directed Only To U.K. Solicitors and Lawyers, Respondent and Judge Casseb Clearly Violated Petitioner's First Amendment Rights.

The fatal black-hole in the Respondent's case was aptly articulated in ***Bates v. State Bar of Arizona***, 433 U.S. 350, 53 L.Ed.2d 810 (1977):

> "The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience. ... Thus, different degrees of regulation may be appropriate in different areas."

53 L.Ed.2d at 835 n.21; emphasis ours. See also, ***R.M.J.***, 71 L.Ed.2d at 73; and ***Spencer v The Honorable Justices of the Supreme Court of Pennsylvania***, 579 F.Supp 880, 892 (E.D.Pa.

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authorizing an anticipatory waiver of the right of trial by jury. Moreover, there are strong presumptions against anticipatory waivers of the right of jury trial. See ***Aetna Insur. Co. v. Kennedy***, 301 U.S. 389 (1936)(the "courts will indulge in every reasonable presumption against a waiver of the fundamental right of trial by jury") and ***Groeger v. Mifles Realty Corp.***, 182 N.Y.S.2d 731 (N.Y.Sup. 1959)(anticipatory waivers of the right of jury trial "are always strictly construed and are not to be lightly inferred or extended by implication"). Since the Agreed Judgment does not contain an express waiver of Sec. 10-23, including Sec. 16-I, the jury trial provision, it is obvious that the Agreed Judgment does not constitute an anticipatory waiver of that right.

1984). As observed by the court in *Spencer*, *as a matter of law "[l]awyers are capable of understanding, evaluating and distilling legal advertisements" and any attempted regulation of communications from one lawyer to another "is unnecessary to advance any state interest and therefore unconstitutional".* 579 F.Supp. at 892; emphasis ours.

Though challenged in the trial court repeatedly by Petitioner to prove that the members of the Law Society of Scotland were so "unsophisticated" that they could not make reasonable verification of the statements contained in the press release, letter and ad, Respondent of course made no effort to offer such proof and Judge Casseb of course made no finding to that effect.[24A]

24A. Moreover, *Zauderer* and *R.M.J.* leave no doubt but that the Respondent had the burden of surmounting all of the required hurdles in order to constitutionally justify interference with Petitioner's rights under the First Amendment. The Court in *Zauderer* stated that "[w]here a regulation is addressed to allegedly deceptive advertising, *the State must ... demonstrate* that the advertising either is inherently likely to deceive or *must muster record evidence* showing that a particular form or method of advertising has in fact been deceptive.'" 85 L.Ed.2d at 677; emphasis ours; also see *R.M.J.*, 455 U.S. at 202.

Therefore, without any question, DR 2-101 is unconstitutional as applied in this case.[25]

4. The Prosecution of Petitioner On the Basis of the Hartman Agent Orange Case Violates Petitioner's Constitutional Rights Under the Vagueness Clause.

Justice Brennan, in his concurring opinion in *Zauderer*, aptly describes the Vagueness Doctrine:

> "A regulation that 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' *Connally v. General Construction Co.*, 269 U.S. 385, 391, 70 L.Ed. 322, 46 S.Ct. 126 (1926). The Fourteenth Amendment's Due Process Clause 'insist[s] that

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25. It has been suggested that there are "less extensive" and more constitutional means (then as stated in DR 2-101) of dealing with communications at or near the scene of disasters, e.g. by setting down *clear* guidelines as to when such communications can be made by potential attorneys (plaintiffs or defendants attorneys) or claims adjusters (e.g., a waiting period except for dealing with emergency needs); how they can be made (permitting press conferences, letters, advertisements, etc., but *not* by direct contact with a victim by an attorney); and further providing no restrictions on content if the communications are, as in this case, directed to the personal lawyer of the victims (recommending, though not requiring, that all such communications be directed to the victim's personal attorney so that reasonable verification can be more easily made and the opportunities for fraud, overreaching and duress better avoided.)

> laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972). ...

As we noted above, the Referral Clause does not specify just *how* referrals are to be made. The Respondent, after-the-fact, took the position in its brief in the state court of appeals that Petitioner violated the Clause by accepting employment *before* referral and by agreeing to work on the case *after* referral.

To require referral by an attorney without being "employed" as an attorney, as suggested by Mr. Smoot and found by Judge Casseb, places the Referral Clause in direct and fatal conflict with DR 2-107 which states that, for a referral to be proper, the client must consent "to the *employment* of the other lawyer ...." (Emphasis ours).

And it was undisputed that Petitioner referred the Hartman case to Mr. Mansulla in accordance with custom and usage in Texas. See App. S. For all of the foregoing reasons, the Referral Clause surely violates the

Vagueness Doctrine, described above.[26]

5. There Can Be No Doubt That The Discriminatory Prosecution of Petitioner In This Case Violated the Petitioner's Constitutional Rights Under the Equal Protection Clause.

In 1985, this Court set the standard that must be followed under the Equal Protection Clause:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 227 (1885).

The Court later further articulated the test by stating that the application of a law or regulation to some but not to others similarly situated, "will survive equal protection (only) to the extent that they are

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26. The Referral Clause as construed by Judge Casseb also conflicts with Sec. 7 of Art. 10 of the State Bar Rules because it imposes a form of sanction which is not expressly authorized by the State Bar Rules. See *State Bar of Texas v. Edwards*, 646 S.W.2d 543 (Tex.App.-Houston [1st Dist] 1982), writ ref'd n.r.e.

substantially related to a legitimate state interest" and the state must show that there is a "rational basis" for the difference in application of such law or regulation. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 87 L.Ed.2d 313, 321, 325 (1985).

Once apparent discrimination appears - such as where there are two or more persons similarly situated and only one is selected for prosecution - the burden shifts to the state to show that such decision was based upon an appropriate and compelling governmental interest, particularly where the prosecution involves constitutionally protected activity such as speech and expression. See *Cleburne v. Cleburne Living Center*, supra; *Ciechon v. City of Chicago*, 686 F.2d 511 (7 Cir. 1982); and *Olshock v. Village of Skokie*, 541 F.2d 1254 (7 Cir. 1976).[27]

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27. The *Ciechon* case bears a remarkable similarity to this one. There, a discharged paramedic with the Chicago Fire Department, Ciechon, brought a civil rights suit alleging that his discharge violated the Due Proces and Equal Protection Clauses of the Constitution. Ciechon and another paramedic, Ritt, handled an emergency call from a family

The analogy between Ciechon and Ritt in the *Ciechon* case and Newman and Musslewhite in this case, cannot be avoided. The involvement of Newman in the Piper Alpha communications in question was much more extensive than the involvement of Petitioner. Yet, though challenged to do so, Respondent made no effort to establish a legitimate governmental reason for prosecuting Petitioner and

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by the name of Ciebien. Mr. Ciebien died after the team left and the Ciebiens complained that the team had mishandled the situation. As a result, Ciechon was dismissed but Ritt was not. The court, revealing a remarkable application of its holding to this case, stated:

> *The disciplinary proceedings against Ciechon also constituted a denial of equal protection of the law because they represented an arbitrary, irrational decision to discriminate among the two paramedics, Ciechon and Ritt, who were equally responsible for the welfare of the patient on all ambulance runs.* Thus two persons similarly situated, in that they experienced the same set of circumstances and were equally responsible for patient assessment and treatment, *were treated absolutely differently.* Ciechon was charged with failure to perform her duties and discharged; Ritt was never charged or disciplined in any fashion. Since the discrimination was intentional, the equal protection clause was violated. *United States v. Falk*, 479 F.2d 616, 619 (7 Cir. 1973)(en banc).

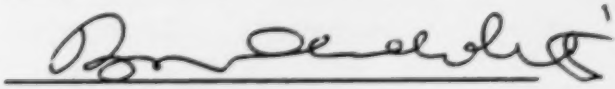
686 F.2d at 522, 523; emphasis ours.

not prosecuting Newman.

In sum, as we stated above, the probability of Petitioner's success in the appeal on the merits of this case is beyond question. At the very least, reasonable "grounds for litigation" are present with regard to such appeal.

WHEREFORE, PREMISES CONSIDERED, Petitoner prays that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,



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